No. 80-829

Supreme Court, U. S.
FILED
NOV 24 1980
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

**UNITED STATES OF AMERICA, ex rel. FRED DEL GENIO,**

*Petitioner,*

vs.

**UNITED STATES BUREAU OF PRISONS, UNITED STATES PAROLE COMMISSION, and ROBERT ELSEA, Warden, Metropolitan Correctional Center,**

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

JULIUS LUCIUS ECHELES
CAROLINE JAFFE
35 East Wacker Drive
Chicago, Illinois 60601

*Attorneys for Petitioner*

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

## QUESTIONS PRESENTED FOR REVIEW

1. If a statute affecting the rights of criminal defendants is ambiguous, may an administrative agency interpret the statute favorably to its views and contrary to the controlling rule of lenity in the interpretation of criminal statutes simply by promulgating a regulation resolving such statutory ambiguity against the normal rule of lenity?

2. Is Parole Commission Regulation, 28 C.F.R. §2.52 (c)(2), as herein interpreted by the District Court and the Seventh Circuit, so as to deprive petitioner of "street time" spent on parole, invalid for conflict with 18 U.S.C. §4210(b)?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions presented for review | i |
| Judgment and opinion below | 1 |
| Jurisdictional statement | 2 |
| Constitutional provisions and statutes involved | 2 |
| Statement of the case | 4 |
| Basis for federal jurisdiction | 4 |
| Statement of facts | 4 |
| Reasons for granting the writ | 5 |
| Parole Commission Regulation 28 C.F.R. § 2.52(c)(2)—interpreted by the District Court and the Seventh Circuit, so as to deprive petitioner of "street time" spent on parole—is invalid for conflict with 18 U.S.C. § 4210(b). Since the statute [18 U.S.C. § 4210(b)] is ambiguous, the Rule of Lenity in interpretation of statutes affecting the rights of criminal defendants must apply; and an administrative agency may not interpret such statute favorably to its views and contrary to the controlling Rule of Lenity. The Seventh Circuit's adoption of the Parole Commission's interpretation of the ambiguous statute, depriving petitioner of "street time," conflicts with the principle that the courts, not administrative agencies, have the final word on matters of statutory interpretation, and with the overriding Rule of Lenity applicable to the interpretation of ambiguous criminal statutes as frequently stated by this Court | 5 |
| The Rule of Lenity: If a criminal statute is ambiguous, it must be resolved in favor of lenity | 6 |


PREVIOUS PAGE WAS BLANK

PAGE

The Courts have the Last Word ..... 9

Conclusion ..... 10

Appendix A—Opinion of the Seventh Circuit Court of Appeals ..... App. 1

Appendix B—Order Denying Rehearing, October 22, 1980 ..... App. 9

## AUTHORITIES CITED

*Cases*

Bell v. United States, 349 U.S. 81 (1955) ..... 7

Bifulco v. United States, ..... U.S. ..... 65 L.Ed.2d 205 (1980) ..... 6, 7

Ford Motor Co. v. NLRB, 441 U.S. 488 (1979) ..... 9

International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) ..... 9

Ithaca College v. NLRB, 623 F.2d 224 (2 Cir. 1980) .... 9

Ladner v. United States, 358 U.S. 169 (1958) ..... 6, 7

Lewis v. United States, ..... U.S. ....., 63 L.Ed.2d 198 (1980) ..... 8

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) .... 9

Mary Thompson Hospital, Inc. v. NLRB, 621 F.2d 868 (7 Cir. 1980) ..... 8

McBoyle v. United States, 283 U.S. 25 (1931) ..... 8

NLRB v. Workers, 434 U.S. 335 (1978) ..... 9

Rewis v. United States, 401 U.S. 808 (1971) ..... 7

Safir v. Gibson, 417 F.2d 972 (2nd Cir. 1970) ..... 9

SEC v. Sloan, 436 U.S. 103 (1978) ..... 9

PAGE

Simpson v. United States, 435 U.S. 6 (1978) ..... 6, 7

United States v. Batchelder, 442 U.S. 114 (1979) ..... 6

United States v. Bass, 404 U.S. 336 (1971 ..... 7, 8

United States v. Cardiff, 344 U.S. 174 (1952) ..... 8

United States v. Fisher, 5 U.S. 2 (2 Cranch) 358 (1804) 7

United States v. Five Gambling Devices, 346 U.S. 441 (1953) ..... 7

United States v. Gradwell, 243 U.S. 476 (1917) ..... 8

United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) ..... 7

Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261 (1968) ..... 9

Whalen v. United States, ..... U.S. ....., 63 L.Ed.2d 715 (1980) ..... 7

*Other Authorities*

18 U.S.C. § 4210(b) ..... 5

28 C.F.R. § 2.52(c)(2) ..... 5

H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196 (1967) ..... 8

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

# NO.

---

**UNITED STATES OF AMERICA, ex rel. FRED DEL GENIO,**

*Petitioner,*

vs.

**UNITED STATES BUREAU OF PRISONS, UNITED STATES PAROLE COMMISSION, and ROBERT ELSEA, Warden, Metropolitan Correctional Center,**

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

Petitioner, Fred Del Genio, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision affirming the District Court's denial of his petition for writ of habeas corpus.

### Judgment and Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit, No. 79-2202, is not yet reported. A copy is attached as Appendix A, per Rule 21.1(k)(i) of this Court.

## Jurisdictional Statement

On September 8, 1980, the Seventh Circuit filed its opinion affirming the judgment of the District Court for the Northern District of Illinois, Eastern Division, affirming the District Court's denial of the petition for writ of habeas corpus. (App. A) Petitioner's timely petition for rehearing was denied on October 22, 1980. (App. B) This Petition is timely filed within 60 days after entry of judgment by a federal court of appeals, as provided in Rule 20.1. Jurisdiction is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATION INVOLVED

The Fifth Amendment to the United States Constitution provides, in part:

> "No person . . . shall be . . . deprived of life, liberty or property without due process of law; . . ."

[Former] 18 U.S.C. § 4205 (repealed as of March 14, 1976), provided:

> "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve."

18 U.S.C. § 4210(b), which replaces [former] 18 U.S.C. § 4205, provides in part:

> "Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall

terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that—

> (2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention, or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense."

28 C.F.R. § 2.52(c)(2) [of the Parole Commission] provides:

> "If the parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by a term of imprisonment, forfeiture of the time from the date of such release to the date of execution of the warrant shall be ordered, and such time shall not be credited to service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility. . . . However, in no event shall the violator term imposed under this subsection, taken together with the time served before release, exceed the total length of the original sentence."

## STATEMENT OF THE CASE

### Basis for Federal Jurisdiction

Petitioner filed a petition for habeas corpus, alleging that he was entitled to be released from custody upon his federal sentence, as it was fully served under the correct, constitutional method of sentence computation. Per Supreme Court Rule 21.1(i), the bases for federal jurisdiction in the court of first instance are 28 U.S.C. §§ 2241 & 2255.

### Statement of Facts

All facts essential to understanding and resolution of the question presented by this Petition are set forth in the Court of Appeals' opinion, App. A, pp. 1-8, and are not repeated here to avoid unnecessary duplication.

Briefly, petitioner asserted that his mandatory release date had erroneously been calculated and that he had fully served his term of imprisonment. He alleged, *inter alia,* that he was entitled to receive credit for "street time," *i.e.,* time spent on parole, when computing the time left to serve from his 1969 conviction.[1]

In affirming the District Court's denial of the petition for habeas corpus, the Seventh Circuit—while dubbing the statute [18 U.S.C. § 4210(b)] "ambiguous," (App. A, p. 5)—adopts the Commission's interpretation automatically depriving parolees of "street time" upon conviction for a new imprisonable offense. (App. A, p. 4)

---

[1] Synoptically, "Petitioner Del Genio has had an extended career in the federal prison system." (App. A, p. 2) The reviewing court noted, "As counsel remarked of his client at oral argument, 'He's been in and out of hot water so much that when I look at him I think of a tea bag.'" (*Id.*, fn. 1).

## REASONS FOR GRANTING THE WRIT

**Parole Commission Regulation 28 C.F.R. § 2.52(c)(2)—as interpreted by the District Court and the Seventh Circuit, so as to deprive petitioner of "street time" spent on parole —is invalid for conflict with 18 U.S.C. § 4210(b). Since the statute [18 U.S.C. § 4210(b)] is ambiguous, the Rule of Lenity in interpretation of statutes affecting the rights of criminal defendants must apply; and an administrative agency may not interpret such statute favorably to its views and contrary to the controlling Rule of Lenity. The Seventh Circuit's adoption of the Parole Commission's interpretation of the ambiguous statute, depriving petitioner of "street time," conflicts with the principle that the courts, not administrative agencies, have the final word on matters of statutory interpretation, and with the overriding Rule of Lenity applicable to the interpretation of ambiguous criminal statutes as frequently stated by this Court.**

Petitioner maintained that he was entitled to release, in that he should be given credit for the amount of "street time" he spent on parole prior to his later conviction. (App. A, pp. 2-3) The statute governing this, 18 U.S.C. § 4210(b), which ostensibly so provides, was otherwise interpreted by the Court of Appeals, in accordance with an administrative agency regulation of the Parole Commission, 28 C.F.R. § 2.52(c)(2). (App. A, p. 5)

However, the Court of Appeals conceded that the statute is ambiguous:

> "The petitioner asks us to hold this regulation inconsistent with the statute. The statute, however, is ambiguous." (App. A, p. 5)

The court then proceeded to give "deference to the agency charged with interpreting the Act," *ibid.*, and—despite the oft-cited Rule of Lenity applicable to the interpretation of criminal statutes—enforced the Commission's interpretation via the cited regulation.

The Court of Appeals thus violated two governing principles of statutory construction: First and foremost, the so-called Rule of Lenity, whereby any legislation affecting the rights of criminal defendants must be interpreted in favor of lenity whenever there is an ambiguity or question as to its meaning; and, secondly, the rule that the courts, not administrative agencies, have the "last word" on matters of statutory interpretation.

**The Rule of Lenity:**

**If a criminal statute is ambiguous, it must be resolved in favor of lenity.**

In *Bifulco* v. *United States,* ..... U.S. ....., 65 L.Ed.2d 205 (1980), Your Honors once again stated the manner in which an ambiguous criminal statute must be interpreted, leaving no doubt that this mandate of statutory construction applies, not only to matters of substantive criminal law, but also to the penalties imposed.[2]

---

[2] "[O]ur examination of the meaning of . . . [a statute] must be informed by the policy that the Court has expressed as *'the rule of lenity.'* In past cases the Court has made it clear that *this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.* See, *e.g., United States* v. *Batchelder,* 442 U.S. 114 . . . (1979); *Simpson* v. *United States,* 435 U.S. 6, 14-15 . . . (1978). The Court's opinion in *Ladner* v. *United States,* 358 U.S. 169, 178 . . . (1958), states the rule: 'This policy of lenity means that the

(footnote continued)

The Rule of Lenity finds its origins in language of Chief Justice Marshall dating back to 1804.[3] It has uniformly been applied thereafter, in such cases as *United States* v. *Bass*, 404 U.S. 336 (1971), in an unbroken line of decisions below set forth.[4]

---

(footnote continued)

> Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' See *Whalen* v. *United States*, ____ U.S. ____, ____, n. 10, 63 L.Ed.2d 715 . . . (1980); *Simpson* v. *United States*, 435 U.S. at 15 . . ." *Bifulco* v. *United States*, ____ U.S. ____, 65 L.Ed.2d 205, 211 (1980). (Emphasis added; parallel citations omitted.)

[3] "[W]here great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; . . ." *United States* v. *Fisher*, 5 U.S. (2 Cranch) 358, 386 (1804).

[4] The following authorities, contained within the quotation from *Bass* below set forth, should be dispositive, when considered together with the language from *Bifulco*, footnote 2, *supra*:

> "First, as we have recently reaffirmed, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' *Rewis* v. *United States*, 401 U.S. 808, 812 . . . (1971). See also *Ladner* v. *United States*, 358 U.S. 169, 177 . . . (1958); *Bell* v. *United States*, 349 U.S. 81, 99 . . . (1955); *United States* v. *Five Gambling Devices*, 346 U.S. 441 . . . (1953) (plurality opinion for affirmance). In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 . . . (1952). This principle is

(footnote continued)

**The court has said the statute is ambiguous.**

**With this "touchstone"[5] at hand, the interpretation of lenity—here, the interpretation which does not automatically deprive petitioner of "street time" in the calculation of his release date—must follow. The court's acceptance of the agency interpretation to the contrary runs afoul of all the foregoing.**

---

(footnote continued)

> founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' *McBoyle* v. *United States*, 283 U.S. 25, 37 . . . (1931) (Holmes, J.) See also, *United States v. Cardiff*, 344 U.S. 174 . . . (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, *where there is ambiguity in a c[r]iminal statute, doubts are resolved in favor of the defendant.* Here, we conclude that Congress has not 'plainly and unmistakably,' *United States* v. *Gradwell*, 243 U.S. 476, 485 . . . (1917), made it a federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce." *United States* v. *Bass*, *supra*, 404 U.S. at 347-49. (Emphasis added: parallel citations omitted.)

[5] "The Court has emphasized that the 'touchstone' of the rule of lenity 'is statutory ambibuity.' See, e.g., *Lewis* v. *United States*, ____ U.S. ____, ____, 63 L.Ed.2d 198, [209] . . . (1980)." *Bifulco* v. *United States*, *supra*, ____ U.S. at ____, 65 L.Ed.2d at 211.

**The Courts have the Last Word**

While dubbing the statute "ambiguous," (App. A, p. 5), the Court of Appeals nonetheless defers to the agency interpretation, though it is *not* the interpretation called for by the Rule of Lenity.

Although deference is to be given to an agency's interpretation of the statute it administers, see *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979); *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978), the courts have the final word on matters of statutory interpretation. *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 565-66 (1979); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).[6]

Here, the Seventh Circuit's "deference" to the agency's non-lenient interpretation of the admittedly ambiguous statute violates not only the Rule of Lenity expostulated above, but also the rule that the judiciary, not the agency, has the final say as to the interpretation of legislation.

While the reviewing court purports to examine legislative intent, (App. A, pp. 6-7), clearly its "deference" to the administrative regulation has become paramount in the decision-making process, in conflict with the principles just stated.

* * *

Certiorari should be allowed so that this Court may speak to the interrelationship between congressional legislation and administrative regulations affecting defendants'

---

[6] *Accord*, *SEC* v. *Sloan*, 436 U.S. 103, 118-19 (1978); *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968); *Ithaca College* v. *NLRB*, 623 F.2d 224, 228-29 (2 Cir. 1980); *Safir* v. *Gibson*, 417 F.2d 972, 976 (2 Cir. 1970); *cf. Mary Thompson Hospital, Inc.* v. *NLRB*, 621 F.2d 868 (7 Cir. 1980).

rights, and to iterate, in no uncertain terms, that the Rule of Lenity applicable to ambiguous statutes cannot be circumvented by an administrative agency. The Seventh Circuit's decision at bar conflicts with a long and unbroken line of cases from this Court, and should not be permitted to stand in the way of petitioner's release.

## CONCLUSION

For the foregoing reasons, this Court should issue a Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit; and, upon consideration of the merits of the petition, the decision below, affirming denial of petition for writ of habeas corpus, should be reversed with directions that petitioner forthwith be released from custody.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLINE JAFFE

*Attorneys for Petitioner*

# APPENDIX

## APPENDIX A

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 79-2202

---

UNITED STATES OF AMERICA, ex rel. FRED DEL GENIO,
*Petitioner-Appellant,*

v.

UNITED STATES BUREAU OF PRISONS, UNITED STATES PAROLE COMMISSION, and ROBERT ELSEA, Warden, Metropolitan Correctional Center,
*Respondents-Appellees.*

---

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-1370—John Powers Crowley, *Judge.*

---

Argued May 8, 1980—Decided September 8, 1980

---

Before FAIRCHILD, *Chief Judge,* NICHOLS, *Senior Judge,** and CUDAHY, *Circuit Judge.*

FAIRCHILD, *Chief Judge.* This is an appeal from a denial of a petition for writ of *habeas corpus.* We agree with the district court that the petitioner's term of imprisonment has not been fully served and thus affirm the judgment.

---

* Senior Judge Philip Nichols, Jr. of the United States Court of Claims is sitting by designation.

Petitioner Del Genio has had an extended career in the federal prison system.[1] It began in November, 1960, when he was sentenced to a fifteen year term for interstate transportation of stolen securities and conspiracy by the District Court for the Western District of Texas. He was paroled from that sentence in October, 1966. In October, 1968, he was arrested in Chicago for violation of parole and returned to custody. In June, 1969, he was convicted of possession of plates for making counterfeit money (the same offense for which his parole had been revoked) and sentenced to a ten year term of imprisonment, to run concurrently with his parole violator term. He was paroled again in November, 1974, but in January, 1978, while still on parole, was convicted of interstate transportation of stolen property. He received only a five year term of probation for this conviction but his parole was again revoked and he returned to custody in March, 1978. Shortly thereafter, he was assigned a mandatory release date of March 28, 1981. In April, 1979 Del Genio filed his petition for writ of *habeas corpus,* alleging that his mandatory release date was calculated erroneously and that he had fully served his term of imprisonment. The district court judge admitted him to bond pending adjudication of the writ and, although the writ was denied, continued the bond pending this appeal.

The petitioner alleges that there were three errors in the computation of his release date. The first was the failure to give him any credit for "street time," *i.e.,* time he had been released on parole, when computing the time left to serve from his 1969 conviction. The second was

---

[1] As counsel remarked of his client at oral argument, "He's been in and out of hot water so much that when I look at him I think of a tea bag."

the refusal to credit towards his ten year term for possession of counterfeit plates the seven months and thirty days he had already spent in custody on the "concurrent" parole violator term. The third was the failure to credit him with "good time" earned during the first imprisonment on the counterfeiting offense.

I.

The question whether "street time" should be credited towards the sentence to be served after a grant of parole has been revoked is one of statutory interpretation. The petitioner's position is that by force of 18 U.S.C. 4210(b) the Parole Commission's jurisdiction over him ended at the expiration of the maximum term for which he was sentenced, as if it had not been interrupted by parole. In this case, since the last term of imprisonment he received was a ten year sentence which he received and began serving in June, 1969, he argues that the Commission's jurisdiction over him as a parole violator ended, at the latest, in June, 1979. The government, on the other hand, argues that because Del Genio was convicted in 1979 of an offense punishable by imprisonment his street time was forfeited and he may be required to serve the entire unexpired portion of his sentence without regard to when he would have been released but for the parole violation.

The question is made somewhat more difficult because although the argument is framed as whether or not "street time" or "time spent on parole" is "credited" or "forfeited," none of those terms is used in the statute. The relevant portions of § 4210 read as follows:

> (b) Except as otherwise provided in this section, the jurisdiction of the Commission over the parolee shall terminate no later than the date of the expiration of the maximum term or terms for which he was sentenced, except that—
>
> * * *

> (2) in the case of a parolee who has been convicted of a Federal, State, or local crime committed subsequent to his release on parole, and such crime is punishable by a term of imprisonment, detention, or incarceration in any penal facility, the Commission shall determine, in accordance with the provisions of section 4214(b) or (c), whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense, but in no case shall such service together with such time as the parolee has previously served in connection with the offense for which he was paroled, be longer than the maximum term for which he was sentenced in connection with such offense.

This statute replaced an earlier one which explicitly provided that the unexpired prison term of a parole violator began to run from the date he returned to custody and that "the time the prisoner was on parole shall not diminish the time he was sentenced to serve." 62 Stat. 854 (1948) (repealed 1976). As it now reads, § 4210 seems to provide exactly the opposite, *i.e.*, that the jurisdiction of the Parole Commission ends when the original term of imprisonment would have expired. Del Genio relies on this as the basis for his argument that he is now being held illegally under the 1969 sentence.

The real question is the meaning of subparagraph (b)(2). From the overall structure of paragraph (b) it is apparent that (b)(2) is intended to create an exception to rule on which Del Genio relies. The exception explicitly applies to "the case of a parolee who has been convicted of a Federal, State, or local crime punishable by a term of imprisonment, detention, or incarceration in any penal facility." Del Genio's 1974 conviction for interstate transportation of stolen property would seem to bring his case squarely

within the exception. But the statute then states that in such a case "the Commission shall determine . . . whether all or any part of the unexpired term being served at the time of parole shall run concurrently or consecutively with the sentence imposed for the new offense." This could be interpreted to mean that (b)(2) applies only to parole violators who are in fact sentenced to imprisonment for their subsequent crimes.

The Commission has resolved the ambiguity inherent in the section by promulgation of a regulation which revokes street time whenever a parolee is convicted of a crime punishable by imprisonment. It was pursuant to this regulation that Del Genio's release date was calculated. The regulation, found at 28 C.F.R. § 2.52(c)(2), reads as follows:

> "If the parolee has been convicted of a new offense committed subsequent to his release on parole, which is punishable by a term of imprisonment, forfeiture of the time from the date of such release to the date of execution of the warrant shall be ordered, and such time shall not be credited to service of the sentence. An actual term of confinement or imprisonment need not have been imposed for such conviction; it suffices that the statute under which the parolee was convicted permits the trial court to impose any term of confinement or imprisonment in any penal facility. . . . However, in no event shall the violator term imposed under this subsection, taken together with the time served before release, exceed the total length of the original sentence."

The petitioner asks us to hold this regulation inconsistent with the statute. The statute, however, is ambiguous. In such a case, of course, it is appropriate to give some deference to the agency charged with interpreting the Act. Furthermore, in this case the agency interpretation is com-

pletely consistent with the intent of the drafters of section 4210(b). The conference committee report includes the following explanation of § 4210(b).

> "(b) This subsection provides that the jurisdiction of the Parole Commission over a parolee terminates no later than the date of the expiration of the sentence imposed by the court except under circumstances cited in this section. . . .
>
> This subsection also provides that an *individual whose parole has been revoked upon conviction of any new criminal offense that is punishable by a term of detention, incarceration or imprisonment in any penal institution shall receive no credit for service of his sentence* from the day he is released on parole until he either returns to Federal custody following completion of any sentence of incarceration or upon the Commission determining that the sentence run concurrently with any new sentence that may have been imposed, pursuant to section 4214(b) or (c) of this Act. In computing the date of expiration of the sentence, the Commission shall take into account the time the parolee previously served in connection with the original offense at commitment prior to his release on parole together with the time served for such offense following his revocation and the time together shall not be longer than the maximum term for which he was sentenced in connection with the original offense.
>
> *The phrase 'punishable by a term of imprisonment detention or incarceration in a penal facility' is intended by the Conferees to mean any term of confinement which may be levied upon adjudication of guilt or delinquency and does not include detention prior to adjudication. For example, a person convicted of any offense punishable by even one day of imprisonment would not automatically receive credit toward service of his sentence, even if no sentence of imprisonment was imposed.*

> This subsection also provides that an individual whose parole has been revoked for the violation of any condition of release other than commission of any Federal, State or local crime punishable by any term of imprisonment, detention or incarceration shall receive credit toward service of his sentence for time previously served in prison and for time spent on parole prior to the date that a warrant or summons is issued pursuant to Section 4213 of this Act."

H.R. Rep. No. 94-838, 94th Cong., 2nd Sess. 31-32 (1976) *reprinted in* [1976] U.S. Code Cong. & Ad. News 351, 364. (Emphasis added.)

We think the Commission's interpretation of the statute is a reasonable one consistent with the intent of Congress. We conclude, therefore, that there was no error in the Bureau's refusal to credit the petitioner with time he had spent on parole in its determination of his release date.

II.

Del Genio also asserts that the Bureau erred in its computation of the ten year sentence he received in June, 1969 for possession of counterfeit plates. The sentencing judge ordered that the ten year sentence was to be served concurrently with the parole violator term. Since Del Genio had been in custody since October, 1968, on the parole violation, he argues that the ten year sentence should have been calculated from that date.

To accept the petitioner's argument is to say his sentence began to run before it was imposed. While a sentencing judge has the discretion to provide that a sentence is to be retroactively concurrent with another sentence which has already been partially served, no such order was made in this case. Thus we agree that the Bureau correctly determined that the petitioner began to serve the ten year sentence in June, 1969.

III.

Finally, the petitioner asserts that on his return to prison he should have been credited with "good time" he had earned prior to his parole. In his opening brief the petitioner alleged that the forfeiture of "good time" was inconsistent with the Federal Prisons Systems Policy Statement No. 5880.15, paragraph 3e which precludes the forfeiture of good time. That policy statement, however, by its own terms applies to "extra good time," something not at issue here. In his reply brief and at oral argument the petitioner took a somewhat different approach, alleging that forfeiture of good time is inconsistent with statutory scheme of 42 U.S.C. § 4161. He also concedes, however, that our recent decision in *Wilkerson* v. *U.S. Board of Parole,* 606 F.2d 750 (1979) holds against him on this point. We decline the invitation to overrule *Wilkerson* and agree with the defendants that there is no requirement that a prisoner who has been returned to custody as a parole violator must be credited with good time which he had accumulated prior to the parole.

For the foregoing reasons the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 22, 1980.

Before
Hon. Thoms E. Fairchild, Chief Judge
Hon. Philip Nichols, Jr., Judge*
Hon. Richard D. Cudahy, Circuit Judge

---

UNITED STATES OF AMERICA, ex rel. FRED DEL GENIO,

Petitioner-Appellant,

No. 79-2202 vs.

UNITED STATES BUREAU OF PRISONS, UNITED STATES PAROLE COMMISSION, and ROBERT ELSEA, Warden, Metropolitan Correctional Center.

Respondents-Appellees.

---

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 79-C-1370
John Powers Crowley, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the appellant, all members of the original panel having voted to DENY a rehearing, accordingly

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* Judge Philip Nichols, Jr. of the United States Court of Claims is sitting by designation.